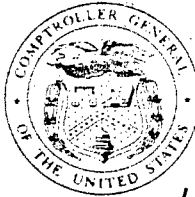


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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548*[Request For Waiver of Debt]*

FILE: B-197979

DATE: October 7, 1980
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MATTER OF: Gunnery Sergeant Jack Thomas, USFMCR

DLGOS 289

DIGEST: A service member whose leave balance increased from minus 26.5 days' leave in July 1975 to plus 6 days in August 1975 without a corresponding entry on his pay account for collection of the value of the leave after receiving leave and earnings statements (LES's) should have known that his subsequent payments were erroneous and he may not have his uncollected debt waived. Further, financial hardship resulting from collection or his exemplary duty performance are not sufficient reasons for a member to retain payments he should have known did not belong to him.

Gunnery Sergeant Jack Thomas, Fleet Marine Corps Reserve, 434-56-0419, requests reconsideration of our Claims Division's denial of his application for waiver of his debt to the United States in the total amount of \$879.91. The debt arose through administrative error due to a failure to collect for excess leave when he extended his enlistment in 1975. The denial is sustained.

As a general rule members of the uniformed services are not entitled to pay and allowances while in an excess leave status, with certain exceptions not applicable here. See 37 U.S.C. 502(b), and Department of Defense Military Pay and Allowances Entitlements Manual, chapter 3.

The record shows that during the period from June 21, 1971, through June 20, 1975, Sergeant Thomas used 155 days' leave and accrued 117 days' leave, resulting in periods of excess leave totaling 38 days. Collections of pay and allowances in the amount of \$243.58 for 10 of these days previously had been made from his pay. However, pay and allowances totaling \$879.91 for the remaining 28 days were not withheld. This amount was computed on the basis of excess leave for the period December 19, 1974, through January 15, 1975. He extended his enlistment on June 21, 1975, at which time the Marine Corps should have established an indebtedness in his pay account in the amount

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of \$879.91 and opened a new leave record effective that date. However, although a new leave record was opened, the erroneous payments of \$879.91 for the 28 days' excess leave was never entered as a collection on Sergeant Thomas' pay account.

Sergeant Thomas transferred to the Fleet Marine Corps Reserve on September 24, 1977. Except for the failure to collect the \$879.91 excess leave debt, he was paid correctly during the period from June 21, 1975, through August 1977. In September 1977, he was paid a midmonth payment and an end-of-month payment in the amounts of \$404 each, a total of \$808. Since his net entitlements for pay and allowances from September 1-24, 1977, and for pay and allowances for 14 days of lump-sum leave exceeded his payments of \$808 by \$236.76, his indebtedness of \$879.91 was reduced to \$643.15. A credit of \$38.62 for a FICA adjustment further reduced his indebtedness to \$604.53.

The erroneous payments have been variously described to Sergeant Thomas as excess leave during 1976 and 1977, allotment overpayments, and the end-of-month check in September 1977 in the amount of \$404. In addition, the amount of the erroneous payments and the indebtedness amount have changed with the initial and subsequent audits of Sergeant Thomas' pay account.

In his initial request for waiver and in his appeal, Sergeant Thomas addresses these inconsistencies in overpayment amounts and contends that he had no knowledge of excess leave overpayments in 1976 and 1977. To support this contention, Sergeant Thomas forwarded copies of his leave and earnings statements (LES's) which clearly indicate that he was not in an excess leave status during 1976 and 1977. He also cited his exemplary service and personal hardship resulting from repayment as grounds for waiver.

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General—

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *"

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We interpret the word "fault," as used in 10 U.S.C. 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in light of all of the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See decisions B-184514, September 10, 1975, and B-193363, August 8, 1979.

In the present situation, since collection for excess leave was not made, Sergeant Thomas was in effect paid for excess leave during the period from December 19, 1974, through January 15, 1975--and not in 1976 and 1977. This excess leave, valued at \$879.91 was erroneously paid to him and was the direct cause of his net indebtedness of \$604.53 at discharge. Accordingly, the amount of \$879.91 may be considered for waiver.

Sergeant Thomas received LES's regularly during the period of the overpayment. Examination of these LES's reveals that the leave for the period December 19, 1974, through January 15, 1975, was deducted from the leave balance on Sergeant Thomas' February 1975 LES which reflected a negative balance of 39 days' leave. His July 1975 LES reflected a negative balance of 26.5 days' leave. In August 1975, however, his LES, instead of reflecting a continuing negative balance, showed a positive balance of 6 days' leave.

Although Sergeant Thomas may not have been aware that the payments of \$879.91 for excess leave were initially erroneous, he certainly knew or should have known that something was wrong with his leave balance when it increased from minus 26.5 days' leave in July 1975 to plus 6 days in August 1975 without any corresponding entry on his pay accounts for collection of the value of the leave. He had a duty to question appropriate officials with regard to this obvious discrepancy. Since Sergeant Thomas failed to make that reasonable inquiry when it would have been immediately corrected, we consider him at least partially at fault in the matter, and are precluded by 10 U.S.C. 2774(b) from granting his application for waiver.

The fact that the overpayments were made through administrative error does not relieve an individual of responsibility to determine the true state of affairs in connection with overpayments. It is


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fundamental that persons receiving money erroneously paid by a Government agency or official acquire no right to the money; such persons are bound in equity and good conscience to make restitution. See B-188595, June 3, 1977; B-124770, September 16, 1955; and cases cited therein. Financial hardship alone, resulting from collection, is not a sufficient reason to retain the payments he should have known did not belong to him. B-183460, May 28, 1975; B-192380, November 8, 1978.

We recognize that Sergeant Thomas' conduct and duty performance may be exemplary, however, this is not a factor that we may properly consider in determining whether waiver should be allowed under the provisions of 10 U.S.C. 2774. See B-198170, June 25, 1980, and B-192380, November 8, 1978.

Accordingly, the action taken by our Claims Division in denying waiver in this case is sustained.

For the


Comptroller General
of the United States